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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SENORINO RAMIREZ CRUZ, et al., Plaintiffs, vs. UNITED STATES OF AMERICA, et al., Defendants.	Case No. C-01-0892 (CRB) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNITED STATES' MOTION TO DISMISS**

Plaintiffs bring this putative class action against the United States, Mexico, the Wells Fargo Bank, and three Mexican government-owned banks on behalf of Mexican nationals who had contracted with the United States to work as agricultural or railroad laborers between 1942 and 1949 pursuant to international agreements between the United States and Mexico. Plaintiffs allege that 10% of these workers' wages were withheld in a savings fund to be transferred to Mexico and refunded to the workers upon their return, but the workers allegedly never received the withheld monies. Invoking the "Little" Tucker Act and the Federal Tort Claims Act and asserting six claims of relief against the United States – including breach of contract, breach of fiduciary or trust duty, resulting trust, accounting, unjust enrichment and conversion -- plaintiffs seek the return of the allegedly withheld monies, compensatory and punitive damages, declaratory and other reliefs. In addition, plaintiffs seek the disgorgement of railroad retirement taxes deducted from putative class members who had worked as railroad workers.

As defendant United States of America will explain below, plaintiffs' claims must be dismissed. The only cognizable claim against the United States is plaintiffs' breach of contract claim under the Little Tucker Act based upon the workers' express contracts with the United States and only for the period prior to January 1, 1946, when the government-administered savings fund provision was in effect. However, that breach of contract claim, along with all of plaintiffs' claims, are barred by the six-year statute of limitations for suits against the United States, 28 U.S.C. § 2401(a), which is a jurisdictional requirement attached by Congress as a condition of the United States' waiver of sovereign immunity.

Moreover, no equitable tolling doctrine operates to save plaintiffs' time-barred claims because the savings fund provision was an express term of plaintiffs' contracts with the United States, and none of the material, factual predicates to plaintiffs' causes of action were inherently unknowable or concealed by the United States. To the contrary, for more than half a century, the workers have been aware of the savings fund withholdings and of their right to a refund upon their return to Mexico.

Thus, plaintiffs' attempt now to revive long-abandoned claims are alternatively barred by

the doctrine of laches due to the extraordinary lapse of time and the concomitant prejudice to the United States' defense of this case. Indeed, it is well-documented that the United States had remitted millions of dollars to Mexico for payment to the workers. But after the passing of more than fifty years, it is likely to be impossible at this juncture to determine the amounts, if at all, still owed to plaintiffs and the individual putative class members.

BACKGROUND

I. The Mexican Farm Labor Program

A. The Wartime Program

1. The 1942 Agreement And Its 1943 Revision

In June 1942, as labor shortages created by the United States' entry into World War II became critical, the United States began negotiating in earnest with the government of Mexico for the temporary migration of Mexican farm laborers into the United States. The Mexican government was reluctant because, among other concerns, many Mexican laborers who had gone to the United States in the past had returned to Mexico impoverished after having spent all of their earnings.[1] On the other hand, Mexico had unemployed labor, and it wanted to contribute to the war effort. Thus, on August 4, 1942, the two governments entered into an agreement for the migration of Mexican nationals to work in the agricultural area, beginning what is commonly known as the "bracero[2] program." One month later, the first group of workers left for California, and eventually the wartime program would place Mexican workers in more than 20 states.[3]

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[1] See Letter No. 2309 from the Ambassador in Mexico (Messersmith) to the Secretary of State, June 23, 1942, reprinted in FOREIGN RELATIONS OF THE UNITED STATES, 1942, Vol. VI, 540-45; see also 2d Amended Compl. ¶ 29.

[2] The term "bracero," from the Spanish word for arm, loosely means hired-hand.

[3] See WAYNE D. RASMUSSEN, U.S. DEP'T OF AGRICULTURE, A HISTORY OF THE EMERGENCY FARM LABOR SUPPLY PROGRAM, 1943-47, 205, 226 (1951) ["Rasmussen"].

The 1942 agreement,[4] and as amended on April 26, 1943,[5] provided the Mexican workers with guarantees of transportation, living expenses, repatriation, and unemployment subsistence, and entitlement to the same rights enjoyed by domestic farm workers as to housing conditions, sanitary facilities, medical services, and occupational insurance.[6] It further guaranteed the Mexican workers the same wages as domestic workers performing similar work in the same locality, but in no event less than 30 cents per hour.[7] Upon the request of the government of Mexico, the 1942 agreement also stipulated that a portion of each worker's wages would be deposited in a savings fund:

> The respective agency of the Government of the United States shall be responsible for the safekeeping of the sums contributed by the Mexican workers toward the formation of their Rural Savings Fund, until such sums are transferred to the Mexican Agricultural Credit Bank which shall assume responsibilities for the deposit, for their safekeeping and for their application, or in the absence of these, for their return.[8]

In the April 26, 1943 amendment, the procedure was changed to require that the savings fund withholdings first be deposited in the Wells Fargo Bank and Union Trust Company of San Francisco for the account of the Bank of Mexico.[9] The United States would be responsible for

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[4] Agreement Respecting the Temporary Migration of Mexican Agricultural Workers, Aug. 4, 1942, U.S.-Mexico, 56 Stat. 1759, E.A.S. 278 [attached as Ex. 1].

[5] Agreement Revising the Agreement of August 4, 1942 Respecting the Temporary Migration of Mexican Agricultural Workers, April 26, 1943, U.S.-Mexico, 57 Stat. 1152, 1162, E.A.S. 351 [attached as Ex. 2].

[6] Ex. 1 at 56 Stat. 1766-68; Ex. 2 at 57 Stat. 1158-61.

[7] Ex. 1 at 56 Stat. 1767; Ex. 2 at 57 Stat. 1160.

[8] Ex. 1 at 56 Stat. 1768. Although the 1942 Agreement also contemplated that the workers would acquire, with money from the savings fund, agricultural equipment from the United States which they could use on their return to Mexico (id.), that purpose was never achieved due to American war production requirements. LOS BRACEROS, DEP'T OF LABOR AND SOCIAL WELFARE, REPUBLIC OF MEXICO 90 (1946) (in Spanish) [select portions attached as Ex. 3; translation attached as Ex. 4].

[9] Ex. 2 at 57 Stat. 1162.

safekeeping the withheld funds only until such deposit, while the Bank of Mexico was responsible for transferring the sums to the Mexican Agricultural Credit Bank.[10]

2. The Individual Work Agreement

A unique feature of the 1942 Agreement was the requirement that the United States contract directly with the workers, under the supervision of the Mexican government, before subcontracting them to American farmers or farmer associations.[11] The Farm Security Administration ["FSA"] of the U.S. Department of Agriculture ["USDA"] – and later the War Food Administration ["WFA"][12] – was designated as the party who would enter into contracts with the workers. Moreover, all work contracts were to be in Spanish, and as further required in the 1943 amendment, were to be endorsed by Mexican authorities of the place of contract and by U.S. government representatives.[13]

The contract, or "individual work agreement," executed by the FSA – and later by the WFA – as the "Patron" closely tracked the terms of the international agreement and was written

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[10] Subsection a. of "Savings Fund" provided:

> The respective agencies of the Government of the United States shall be responsible for the safekeeping of the sums contributed by the Mexican workers toward the formation of their Rural Savings Fund, until such sums are transferred to the Wells Fargo Bank and Union Trust Company of San Francisco for the account of the Bank of Mexico, S.A., which will transfer such amounts to the Mexican Agricultural Credit Bank. This last shall assume responsibility for the deposit, for the safekeeping and for the application, or in the absence of these, for the return of such amounts.

Ex. 2 at 57 Stat. 1162.

[11] Ex. 1 at 56 Stat. 1766; Ex. 2 at 57 Stat. 1159.

[12] The Mexican farm worker program was transferred to WFA on July 1, 1943,. See Rasmussen at 208. When WFA was dissolved in 1945 at the end of WWII, the program was transferred to USDA's Production and Marketing Administration ["PMA"]. See, infra, note 87.

[13] Ex. 1 at 56 Stat. 1766; Ex. 2 at 57 Stat. 1158-59.

in both English and Spanish [14] In addition, it specified that the savings fund deduction would be 10% of the worker's wages:

> The Worker agrees that ten per cent (10%) of his wages may be deducted and authorizes the Patron to receive such amount from the Employer and to place it on deposit to be refunded to him on his return to his place of origin, or as soon as practicable, in the form of credits to his account in the Agricultural Credit Bank of Mexico.[15]

This provision was later revised to require that credits to the workers' account be in Mexican currency at the rate of exchange in effect on the date the bank received that money.[16]

Pursuant to established procedures, the terms of the individual work contract were explained to the workers in small groups at the point of recruitment in Mexico by representatives of both governments, and each worker was given an original copy of the contract, executed by him and the representatives of both governments, before arrival at the border.[17]

The wartime Mexican farm labor program was funded by the President's Emergency Fund until April 1943, when Congress passed special legislation authorizing the recruitment of foreign agricultural workers from North, South, and Central America.[18] This legislation, later extended several times, formed the basis of the Emergency Farm Labor Supply Program.

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[14] Exhibits A (standard individual work agreement) and T (standard agreement of renewal of work agreement) to "Consolidated Progress Report of the Mexican Farm Labor Transportation Program of the Farm Security Administration," through Nov. 20, 1942 [attached as Exhibit 5]. The model contract would later be amended several times. See Los Braceros, Ex. 3 at 19-22, translation, Ex. 4 at 15-18 (discussing changes to the standard contract for agricultural workers); see also sample Individual Work Agreement, eff. Apr. 24, 1945, enclosure to Wilson R. Buie, WFA, to John Willard Carrigan, Dep't of State, June 23, 1945 [attached as Ex. 6].

[15] Ex. 5, standard individual work agreement at 2 ¶ 5; see also 2d Amended Compl. ¶ 31.

[16] See Los Braceros, Ex. 3 at 20, translation, Ex. 4 at 16; see also sample individual work agreement, Ex. 6, at ¶ 5.

[17] See Letter from Harry F. Brown, FSA, to Thomas A. Robertson, USDA, Apr. 13, 1943, pp. 4-6 [attached as Ex. 7]; FSA Regional Instructions 478.3-A: "Routine for the Selection and Transportation of Mexican Agricultural Workers," Dec. 30, 1942, at 3-4, 6 [attached as Ex. 8].

[18] Act of April 29, 1943, Pub. L. 45, 57 Stat. 70.

3. Repatriation and the End of Savings Fund Deductions

With brief interruptions, recruitment of Mexican farm workers continued until July 1945.[19] As the war was coming to an end and with legislation supporting the program expiring on December 31, 1945,[20] the two governments stepped up efforts to repatriate the workers. With the exception of approximately 21,000 workers who renewed their contracts until sometime in 1946, all remaining farmer workers' contracts were terminated on or before December 31, 1945, and the workers repatriated by early 1946.[21]

During that same period of time, the Mexican government also requested that savings fund withholdings be ceased, and the United States assented.[22] On December 28, 1945, the American Embassy informed Mexico's Minister of Foreign Affairs that USDA "ha[d] issued instructions that such discounts should cease as of January 1, 1946, or at the end of the first pay-period thereafter."[23] For those workers who had extended their employment contracts into 1946, USDA also correspondingly amended their contracts to delete the savings fund provision.[24] In

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[19] Rasmussen at 217-18.

[20] See Act of Dec. 22, 1944, Pub. L. 529, 58 Stat. 862.

[21] Rasmussen at 227-28; see also letter No. 7899 from the Acting Secretary of State to Ambassador Messersmith, Sept. 11, 1945, at 1149-50 and n. 60 [attached as Ex. 9].

[22] See Dispatch No. 27923 from Sidney E. O'Donoghue, First Secretary of Embassy, to the Secretary of State, Jan. 10, 1946, and enclosures (letter and translation from F. Castillo Najera, Minister of Foreign Affairs, to Ambassador Messersmith, Dec. 19, 1945, and note No. 4637 from O'Donoghue to Foreign Minister Najera, Dec. 28, 1945) [attached at Ex. 10]; Los Braceros, Ex. 3 at 90 and translation, Ex. 4 at 27.

[23] Ex. 10, note No. 4637 from First Secretary O'Donoghue to Foreign Minister Najera, Dec. 28, 1945; see also letter from K. A. Butler, USDA, to John Willard Carrigan, Dep't of State, Dec. 26, 1945 ("we have . . . requested all of our Divisional offices to instruct employers of Mexican Nationals to discontinue the 10% deduction for savings purposes from the Nationals' wages. . . ") [attached as Ex. 11].

[24] See Letter from William A. Anglim, Chief of Operation [PMA], to Wilson R. Buie, Director of Labor, Dec. 21, 1945, and attachments [attached as Ex. 12].

all, a total of approximately 174,925 Mexican farm workers, who were admitted prior to 1946,[25] were subject to the savings fund provision.

4. Extension of the Emergency Farm Labor Supply Program: The 1946-47 Program

Although the Emergency Farm Labor Supply Program – of which the Mexican farm worker program was a part – was due to expire at the end of 1945, the farming industry successfully lobbied Congress to extend the program for another year.[26] By March 1946, the Mexican government also consented to the recruitment of Mexican workers for the remainder of 1946, but with new understandings with respect to the 1942 agreement, as amended, and the individual work contract.[27] Consistent with the two governments' prior decision to cease the 10% withholding, the "savings fund" provision was deleted from the international agreement and deemed inoperative.[28] The revised individual work contract in turn provided that "[n]o deduction shall be made from the wages of the Worker for commissions, fees or any other purpose (except as may be required by law) . . . ."[29]

Because of further extensions by Congress,[30] the government-administered Mexican farm

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[25] HOUSE COMM. ON THE JUDICIARY, 88TH CONG., STUDY OF POPULATION AND IMMIGRATION PROBLEMS 33, Table 1 (Comm. Print 1963) ["1963 House Comm. Print"].

[26] See Act of Dec. 28, 1945, Pub. L. 269, 70 Stat. 969.

[27] See Dispatch No. 29471 from First Secretary O'Donoghue to the Secretary of State, May 14, 1946, and enclosures dated March 26 and 30, April 30, 1946 [attached as Ex. 13]; see also Los Braceros, Ex. 3 at 20-21 and translation, Ex. 4 at 16-17 (discussing modifications to the 1946 model work contract).

[28] Ex. 13, letter from Foreign Minister Najera to Ambassador Messersmith, Apr. 30, 1946 ("The Mexican Government is in accord that the provisions entitled 'Savings Fund' be deleted from the Agreement and deemed inoperative.").

[29] Standard individual work agreement at ¶ 4 of conditions, Form LR 601-3W, Revised March 20, 1946, USDA, PMA, Labor Branch [attached as Ex. 14]; see also Los Braceros, Ex. 3 at 20-21 and translation, Ex. 4 at 17.

[30] Third Deficiency Appropriation Act of 1946, Pub. L. 521, 60 Stat. 617 (July 23, 1946); Act of April 28, 1947, Pub. L. 40, 61 Stat. 55.

labor program actually continued through 1947. No further modifications were made to the individual work agreement in 1947, and the international agreement was amended in only minor respects.[31] All workers' contracts were terminated on or before December 31, 1947.[32] Thereafter, the government administered "bracero program" ceased to exist, and all subsequent contracting of Mexican farm workers was to be directly between the worker and the farmer-employer.

5. Illegal Migration and Farmer-Worker Direct Contracting

Notably, even before the end of the wartime program in 1947, the two governments had authorized some direct contracting by farmers as a solution to illegal immigration. Under the wartime program, recruitment and contracting were conducted in the interior of Mexico to discourage Mexican laborers from migrating northward. However, almost from the beginning, thousands of laborers migrated to the Mexican borders, and the influx of illegal immigration from Mexico continued unabated. By early 1949, the number of illegal Mexican workers was estimated to have reached 400,000.[33]

Texas, in particular, had a considerable number of illegal Mexican workers. Since the beginning of the government-administered farm labor program, the Mexican government consistently had refused to allow Texas' participation because of its belief that Texas had a history of discrimination against Mexicans.[34] This refusal, however, did not deter Mexican nationals from migrating illegally to Texas in search of employment.[35]

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[31] See Agreement Respecting the Temporary Migration of Mexican Agricultural Workers Supplementing the Agreement of Aug. 4, 1942 as Revised on April 26, 1943, U.S.-Mexico, March 25 and April 2, 1947, 61 Stat. 3738, T.I.A.S. 1710.

[32] See Memo. from Wilson R. Buie to William A. Anglim, PMA, USDA, "Final Report on Activities of Foreign Farm Labor Program," Jan. 30, 1948, ¶ 3 [attached as Ex. 15].

[33] See MIGRATORY LABOR IN AMERICAN AGRICULTURE, REPORT OF THE PRESIDENT'S COMMISSION ON MIGRATORY LABOR 69 (1951) ["President's Comm'n Report"].

[34] See President's Comm'n Report at 39.

[35] See id.

In March 1947, after several unsuccessful attempts to deter the illegal movement of Mexican workers, the two governments concluded an agreement for the first time to "legalize" these workers, including those in Texas, by allowing them to contract directly with American farmers.[36] In Texas alone that year, approximately 55,000 illegal workers were "legalized."[37] These "legalized" workers, however, were not part of the farm labor supply program administered by the USDA. As the two governments agreed, "it [was] United States employers who [would] hire the agricultural workers, with no question of contractual relations between the latter and the Government of the United States,"[38] nor would the United States "provide policing for the fulfillment of such contracts."[39]

B. The Post-1947 Mexican Farm Labor Program

1. The 1948 Agreement

Between 1948 and 1964, the two governments entered into a series of farm labor agreements that differed drastically from their wartime predecessors. Unlike the wartime program, the U.S. government would no longer be responsible for recruitment in Mexico, and the Mexican workers were to contract directly with American farmers. For example, the first such international agreement, executed in February 1948, specifically provided that "[t]he contracts, whether renewals or new, will be on a direct worker to employer basis."[40] Uniquely, the 1948 Agreement re-instituted the requirement of savings fund deductions, except now the farmer-

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[36] See Agreement Replacing the Agreements of June 2, 1944, and January 9, 1945, Respecting Mexican Agricultural Workers, March 10, 1947, U.S.-Mexico, 61 Stat. 4097, T.I.A.S. 1857 [attached as Ex. 16] and its Supplement, 61 Stat. 4106, T.I.A.S. 1858 [attached as Ex. 17].

[37] See President's Comm'n Report at 52; 1963 House Comm. Print at 32.

[38] Ex. 17 at 61 Stat. 4110.

[39] Ex. 17 at 61 Stat. 4107.

[40] See Agreement Respecting Temporary Migration of Mexican Agricultural Workers, February 20, 21, 1948, U.S.-Mexico, 62 Stat. 3887, T.I.A.S. 1968 [attached as Ex. 18]; id. at 3888-89.

employer was to refund the withheld money, in a certified or cashier's check, directly to the Mexican worker upon termination of the contract, and the Immigration and Naturalization Service was to endorse the check at the time the worker crossed the border.[41]

The 1948 Agreement, which became effective in February 1948, was short-lived, however. Mexico abrogated the agreement eight months later in October 1948, after what is known as the "El Paso Incident."[42] In October that year, several thousand Mexican nationals made a dash into El Paso, Texas, but instead of being returned to Mexico, they were allowed to obtain employment from American farmers.

2. The 1949 Agreement

No international agreement was in effect until August 1, 1949, when the two governments again entered into a new agreement for the migration of farm labor. As with the 1948 Agreement, the 1949 Agreement provided that contracts were to be executed directly between the farmer and the Mexican worker.[43] Although the U.S. Employment Service of the Department of Labor could select and contract for workers in Mexico as the farmer's agent, the 1949 Agreement specifically provided that the United States did not assume liability for any of the farmer's obligations.[44] In addition, unlike the 1948 Agreement, the 1949 Agreement did not authorize savings fund deductions.[45] Section 5 of the standard individual work agreement similarly provided: "No deductions shall be made from the Workers' wages for any savings fund or union

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[41] Ex. 18 at 62 Stat. 3892, ¶ 25.

[42] See President's Comm'n Report at 52; FOREIGN RELATIONS OF THE UNITED STATES, 1948, Vol. IX, at 645-46 [attached as Ex. 19].

[43] Agreement on Mexican Agricultural Workers, Aug. 1, 1949, U.S.-Mexico, T.I.A.S. 2260, at 3, 43 [attached as Ex. 20].

[44] Ex. 20, T.I.A.S. 2260, at 3; see also id. at 43-44 ("The United States Government . . . will under no circumstances assume any of the Employer's obligations under the Individual Work Contract.").

[45] See Ex. 20, T.I.A.S. 2260; 2d Amended Compl. ¶ 47.

dues."[46] Indeed, no savings fund deductions were again required in subsequent international agreements on Mexican farm workers.[47]

The last international agreement expired on December 31, 1964, and the Mexican farm labor program officially came to an end.[48] The total number of Mexican farm workers recruited from the inception of the wartime program was reported to be more than 4.6 million, and the employment of Mexican workers during the wartime program – totaling some 226,600 workers between 1942 and 1947 – was the lowest during the 22-year history.[49]

II. The Mexican Railroad Worker Program

A. The April 29, 1943 Agreement for Non-Agricultural Workers

Although many Mexican laborers recruited during the WWII era worked in the agricultural area, some were unskilled railroad workers recruited pursuant to a separate international agreement that entered into force on April 29, 1943. This agreement for non-agricultural workers generally paralleled the 1942 agricultural agreement, as amended, including similar provisions regarding contracts, admission, transportation, wages, employment, and the creation of a savings fund.[50] The minimum wage, however, was much higher, at 46 cents per hour, which later rose to 57 cent per hour.

Instead of the USDA, the United States would contract with the railroad workers through

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[46] Ex. 20, T.I.A.S. 2260 at 14, 54.

[47] The farmer employers, however, were permitted to make certain specified deductions, such as advances against wages and for food and clothing. See, e.g., Ex. 20, T.I.A.S. 2260 at 14, ¶ 5; id. at 54.

[48] See Act of Dec. 13, 1963, Pub. L. No. 88-203, 77 Stat. 363 (1963); Agreement Extending the Migrant Labor Agreement of August 11, 1951, as amended and extended, U.S.-Mexico, Dec. 20, 1963, T.I.A.S. 5492.

[49] SENATE COMM. ON THE JUDICIARY, 96TH CONG. 2D SESS., TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES, at 27-28, 36 (Comm. Print 1980) ["1980 Senate Comm. Print"].

[50] See Agreement Respecting the Recruiting of Mexican Non-Agricultural Workers, April 29, 1943, U.S.-Mexico, 57 Stat. 1353, E.A.S. 376 [attached as Ex. 21].

the Chairman of the War Manpower Commission ["WMC"], and WMC was the agency responsible for depositing savings fund deductions to the account of the Bank of Mexico in a designated American bank.[51] As with the agricultural program, the Bank of Mexico in turn was responsible for transferring the sums to Mexico, or specifically, to the Banco del Ahorro Nacional, S.A. -- i.e., the Mexican National Savings Bank – as opposed to the Agricultural Credit Bank.[52] WMC would in turn ensure that the National Savings Bank was provided with the names of the beneficiaries and the corresponding amounts due each worker.[53]

Like the farm workers, each railroad worker executed an Individual Work Agreement agreeing that "10% of his wages may be deducted for his savings funds," and authorizing the WMC, as the "Patron," "to receive such amount from the Employer, and to place it on deposit, to be refunded to him on his return to his place of contract, or as soon as practicable, in the form of credits to his account in the Banco del Ahorro National, S.A. * * * "[54] However, as with the farm workers, savings fund deductions ceased on January 1, 1946, at the request of the Mexican government.[55]

Recruitment of railroad workers, which was conducted by the Railroad Retirement Board,[56] lasted from May 1943 until the summer of 1945, and more than 130,000 Mexican laborers participated in the railroad program, working for some 36 railroads.[57] By early 1946, the railroad workers were repatriated along with the farm workers, and their contracts

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[51] Ex. 21 at 57 Stat. 1355, 1357.

[52] Ex. 21 at 57 Stat. 1357-58.

[53] Ex. 21 at 57 Stat. 1358.

[54] See sample individual work agreement, ¶ 5 [attached as Ex. 22].

[55] See Ex. 13, note No. 4639 from First Secretary O'Donoghue to Foreign Minister Najera, Dec. 29, 1945; see also letter with enclosures from John D. Coates, Dep't of Labor, to Carrigan, Dec. 29, 1945 [attached as Ex. 23].

[56] 1963 House Comm. Print at 143.

[57] 1963 House Comm. Print at 143-44.

terminated.[58] No railroad program was again instituted after the war.

B. Contributions to the Railroad Retirement Account

In addition to the 10% savings fund deductions, each Mexican railroad worker also contributed a portion of his salary to the Railroad Retirement Account as required by the Internal Revenue Code of 1939.[59] Pursuant to the Railroad Retirement Act of 1937,[60] the collected taxes were then used to finance a staff retirement plan providing annuities to aged retired railroad employees based upon their creditable railroad earnings and service. Although the Mexican government had lobbied for an exemption for the Mexican railroad workers, the international agreement made no provision for such an exemption.[61]

III. Reported Amounts of Savings Fund Deductions

Although the government-administered savings fund deductions ceased on January 1, 1946, claims processing predictably continued for sometime thereafter. According to a periodic report from USDA to the State Department, as of March 15, 1946, a total of $16,010,111.00 had been remitted to the Mexican Agricultural Credit Bank on behalf of the farm workers.[62] A 1946

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[58] See Letter from the Secretary of State to the Mexican Ambassador, Dec. 10, 1045, reprinted in FOREIGN RELATIONS OF THE UNITED STATES, 1945, Vol. IX, 1153-56; 2d Amended Compl. ¶ 41.

[59] Pub. L. No. 1, 53 Stat. 1 (relevant portion codified in 26 U.S.C. §§ 1500-1537 (1939)).

[60] Pub. L. No. 162, 50 Stat. 307 (codified in 45 U.S.C. §§ 228a to 228z-1 (1937)).

[61] See Agreement Respecting Mexican Non-agricultural Workers; Termination of the Agreement of April 29, 1943, and Refund of Deductions from Salaries under the Railroad Retirement Act, Nov. 15, 1946, U.S.-Mexico, 61 Stat. 3575, 3576, T.I.A.S. 1684 [attached as Ex. 24]; see also 2d Amended Compl. ¶ 43. The State Department did agree that a refund was desirable and agreed to "endeavor to obtain" from Congress the necessary appropriation for a lump sum payment to the government of Mexico for distribution to the individual workers. 61 Stat. 3575-76. No such appropriation was ultimately authorized by Congress, however.

[62] See Letter from C. E. Herdt, WFA [PMA] to William G. MacLean, Dep't of State, March 21, 1946, and a similar periodic report dated June 16, 1945 [attached as Ex. 25]. As for railroad workers, periodic reports of the amounts of savings fund deductions were submitted by the individual railroad companies to the American Embassy in Mexico. See, e.g., cover letters dated Aug. 20, 1943, March 25, Apr. 20, and July 19, 1944, from various railroad companies to

report entitled "Los Braceros," and prepared by the Mexican Department of Labor and Social Welfare, similarly reported that the Mexican Agricultural Credit Bank had received, by around May 1946, 80,155,288.05 pesos, or US $16,595,297.730, for the farm workers, while the National Savings Bank had received, by around June 1946, 88,098,852.66 pesos, or US $18,239,928.01, for the railroad workers.[63] According to the report, the two Mexican banks had disbursed 69% of the farm workers' withholdings as of May 1946, while the rate was much higher, at 95% as of June 1946, for the railroad workers.[64]

Each worker's 10% withholding is likely to have been small, however, because the contract term was generally for only six months, with some workers staying for as short as two months.[65] Even with some renewals, the average length of a worker's stay was estimated to be only about eight months.[66]

IV. Mexican Workers' Complaints

Prior to their repatriation, the Mexican workers were advised by both governments of the procedures for obtaining a refund of their 10% retain.[67] For example, except for a brief initial period where refunds were made only in Mexico City, Mexico,[68] a repatriated worker could request the respective bank – i.e., the Mexican Agricultural Credit Bank or the Mexican National

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the American Embassy [attached as Ex. 26].

[63] Los Braceros, Ex. 3 at 89, and translation, Ex. 4 at 25-26.

[64] See Los Braceros, Ex. 3 at 89, and translation, Ex. 4 at 25-26.

[65] Rasmussen at 207; 2d Amended Compl. ¶ 28; Los Braceros, Ex. 3 at 86 and translation, Ex. 4 at 23.

[66] Los Braceros, Ex. 3 at 86 and translation, Ex. 4 at 23.

[67] See "Instructions for Collecting the 10% Retain" attached to memorandum from William Tolbert, WFA,, Nov. 9, 1943; memo. and attachment from Office of Labor, WFA to Assistant FLP Supervisors, area representatives, Acting State Director, and Regional Office personnel regarding "Instruction for Obtaining 10% Retain," Nov. 4, 1943 [attached as Ex. 27]; see also letters from Robert L. Clark, WMC, to J. F. McGurk, Dep't of State, March 16, 1944 [attached as Ex. 28].

[68] See Los Braceros, Ex. 3 at 90, and translation, Ex. 4 at 27.

Savings Bank, to send the 10% withholdings to him by money order.[69] Processing of the workers' claims of refund, however, proved to be administratively difficult.[70] According to a State Department estimate on June 18, 1945, there was a total lag time of three to four weeks from the end of a pay roll period of a worker in the field to the delivery of the worker's 10% savings to the Wells Fargo Bank.[71] Farm workers tended to experience more delay partly because, unlike railroad workers who most likely had worked for only one railroad company, farm workers tended to have been employed by more than one grower. Other administrative hurdles might have also delayed individual workers' collection. For example, a repatriated worker who initially could not recover his 10% withholding generated numerous correspondence among the state and regional offices of the War Manpower Commission, the Northern Pacific Railroad Company, which employed the worker, and the Railroad Retirement Board ["RRB"] before it was determined that there was likely an error in the translation of the worker's name.[72]

As the American Ambassador noted at that time, there were numerous complaints from the workers about the savings fund deductions.[73] Indeed, some workers had complained through the Consul General of Mexico,[74] while some sought the assistance of the local Mexican

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[69] See Ex. 27, "Instructions for Collecting the 10% Retain."

[70] See Note No. 2736 from Ambassador Messersmith to Padilla, Secretary for Foreign Relations, June 14, 1944, at 2 [attached as Ex. 29].

[71] See Letter from William. G. MacLean, Dep't of State, to Sidney O'Donoghue, American Embassy, June 18, 1945 [attached as Ex. 30].

[72] See Memo. from A.F. Hardy, State Office, WMC, to F. W. Hunter, Regional Director, WMC, Oct. 28, 1994 and enclosures (hand written letter and translation from Juan Rios Balades, Sept. 21, 1944; letter from WMC to the Northern Pacific Railroad Co., Oct. 16, 1944; and the Northern Pacific Railroad Co.'s response, Oct. 24, 1944), and other correspondence dated Nov. 3, 10, and 17 and Dec. 4 and 11, 1944 [attached as Ex. 31].

[73] See Ex. 29, diplomatic note No. 2736 at 2.

[74] See, e.g., Memo. from William H. Tolbert, State Director, WFA to William A. Anglim, Regional Director, WFA, Nov. 15, 1943 (enclosing letter No. 5911 from Col. Vincente Peralta Coronel, Consul General of Mexico), and Anglim's response, Nov. 20, 1943; see also Nov. 20, 1943 letter from Anglim responding to letter No. 6079 [attached as Ex. 32].

Consulate in the United States.[75] Still other workers wrote directly to the responsible U.S. government agency.[76] Even Mexican nationals then still employed in the United States were requesting detailed statements of the deductions deposited to their account in the respective Mexican banks.[77] Through the end of 1946, USDA continued to receive inquiries from Mexican workers about their 10% retain.[78]

V. Plaintiffs' Claims

In the Second Amended Complaint, plaintiffs assert six claims of relief against the United States: 1) breach of contract based upon the August 4, 1942 international agreement and subsequent international agreements with Mexico, and the individual work contracts entered into between the United States and plaintiffs; 2) breach of fiduciary or trust duty based upon the international agreements; 3) a resulting trust also based upon the international agreements; 4) accounting; 5) unjust enrichment; and 6) conversion. 2d Amended Compl. ¶¶ 62-86, 187-200. In addition to seeking compensatory and punitive damages, prejudgment interest, and declaratory relief, plaintiffs also pray for an accounting, the creation of a constructive trust, and "the disgorgement of any and all [allegedly] wrongfully withheld assets, including all interests accrued thereon and all profits derived therefrom." Id. at 37-38. Moreover, plaintiffs seek certification of a class encompassing "all persons who worked in the Bracero program operated by the United States and Mexican government at any time between September 1942 and

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[75] See, e.g., Letters (Nos. 303, 380 and 442) from Ruben Riestra E., Vice Consul in Charge, to L. Wayne Adams, PMA, USDA, dated Apr. 4 and 18 and May 3, 1946; USDA's memoranda and responses dated Apr. 15 and 26, and May 13, 1946 [attached as Ex. 33].

[76] See, e.g., Letter from Luis Ruiz Fuentes, Oct. 11, 1944; letter from Glenn E. Brockway, WMC, to Fuentes, Oct. 20, 1944; letter from Brockway to Southern Pacific Co., Oct. 20, 1944; and letter from Southern Pacific Co. to Mexican National Savings Bank, Oct. 28, 1944 [attached as Ex. 34].

[77] See Letter from William A. Anglim, PMA, USDA, to William Costello, Area Representative, Apr. 17, 1946 [attached as Ex. 35].

[78] See USDA memoranda dated Nov. 7, 13, and 19, Dec. 4, 6, 16, 19, 23, 27, and 31; and letter from William A. Anglim, PMA, USDA to MacBeth and Perelli-Minetti, Dec. 27, 1946 [attached as Ex. 36].

December 1949 ('braceros') and the successors or heirs of deceased braceros." 2d Amended Compl. ¶ 53.

ARGUMENT

I. Standard of Review

A. Motion to Dismiss under Rule 12(b)(1)

A motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) can attack either the allegations of the complaint as insufficient to confer jurisdiction, or the existence of subject matter jurisdiction in fact. See Thornhill Publ'g Co. v. General Tel. & Electronics Corp., 594 F.2d 730, 733 (9th Cir. 1979). When the motion to dismiss attacks the allegations of the complaint as insufficient to confer subject matter jurisdiction, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Federation of African Amer. Contractors v. City of Oakland, 96 F.3d 1204, 1207 (9th Cir. 1996).

A plaintiff cannot, however, rely on conclusory allegations of law and unwarranted inferences to defeat a motion to dismiss. See In re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996). Moreover, "a plaintiff with a legally deficient claim cannot survive a motion to dismiss simply by failing to attach a dispositive document on which it relied." Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 426 (3d Cir. 1999) (citation omitted). Thus, if a plaintiff does not attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an authentic copy to the court without converting the motion into one for summary judgment. Mishler v. Clift, 191 F.3d 998, 1009 n.7 (9th Cir. 1999); In re Silicon Graphics, Inc. Securities Litig., 183 F.3d 970, 986 (9th Cir. 1999). Similarly, a court may consider authentic official public records pertinent to plaintiff's claims. MGIC Indemnity Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986).

When the motion to dismiss is a factual attack on subject matter jurisdiction, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the existence of subject

matter jurisdiction. Id.; Moyer v. United States, 190 F.3d 1314, 1318 (Fed. Cir. 1999); St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir.), cert. denied, 493 U.S. 993 (1989); see also White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000) ("With a factual Rule 12(b)(1) attack [], a court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment. It also need not presume the truthfulness of the plaintiffs' allegations.") (internal citations omitted).

B. Sovereign Immunity Standards

It is "axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." United States v. Mitchell, 463 U.S. 206, 212 (1983). Only Congress may waive the sovereign immunity of the United States, United States v. Kubrick, 444 U.S. 111 (1979); United States v. Testan, 424 U.S. 392, 398-99 (1976), and "the terms of [the] waiver of sovereign immunity define the extent of the court's jurisdiction." United States v. Mottaz, 476 U.S. 834, 841 (1986); see also Marshall Leasing, Inc. v. United States, 893 F.2d 1096, 1098 (9th Cir. 1990). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit," Department of Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999) (internal quotations omitted), and the court is without jurisdiction to hear the suit. See FDIC v. Meyer, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."). Thus, when the United States moves to dismiss an action based on sovereign immunity, the question is one of subject matter jurisdiction. See Proctor v. United States, 781 F.2d 752, 753 (9th Cir.), cert. denied, 476 U.S. 1183 (1986).

Moreover, a waiver of sovereign immunity cannot be implied but "must be unequivocally expressed in the statutory text," and be "strictly construed, in terms of its scope, in favor of the sovereign." Blue Fox, 525 U.S. at 261; see also Lane v. Pena, 518 U.S. 187, 192 (1996); Irwin v. Dep't of Vets. Affairs, 498 U.S. 89, 95 (1990); Tucson Airport Auth. v. General Dynamics Corp., 136 F.3d 641, 644 (9th Cir. 1998); RHI Holdings, Inc. v. United States, 142 F.3d. 1459, 1461 (Fed. Cir. 1998). "[G]reat care must be taken not to expand liability beyond that which was explicitly consented to by Congress." Fidelity Const. Co. v. United States, 700 F.2d 1379, 1387

(Fed. Cir.), cert. denied, 464 U.S. 826 (1983). As the Ninth Circuit has observed, "[i]t is clear . . . that the concept of make-whole relief inherent in much of the common-law tradition does not apply in the context of actions brought against the United States. Instead, a suit against the United States must start from the opposite assumption that no relief is available." Tucson Airport Autho., 136 F.3d at 644. Thus, that a plaintiff suing the United States may receive less than complete relief in the federal courts should not necessarily be viewed as an inappropriate result, "for such a plaintiff is accorded, by statute, more relief than historical principles of sovereign immunity would allow." Id.

Taken together, the above principles establish a "high standard" that must be met by any party seeking to demonstrate a waiver of the United States' sovereign immunity. Blue Fox, 525 U.S. at 261. And as with all cases invoking federal jurisdiction, the burden of establishing jurisdiction is on the plaintiff. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Hexom v. Oregon Dep't of Transp., 77 F.3d 1134, 1135 (9th Cir. 1999) ("It is the burden of plaintiffs to persuade the federal courts that subject matter jurisdiction does exist."); Trauma Service Group v. United States, 104 F.3d 1321, 1324 (Fed. Cir. 1997).

II. Plaintiffs' Claims Are Cognizable, If At All, Only Under the "Little" Tucker Act

Plaintiffs have cited the general provision for federal question, 28 U.S.C. § 1331, the Tucker Act, 28 U.S.C. § 1346(a)(2), and the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), as the jurisdictional bases of their claims. Of these, it is well-settled that §1331 does not waive the sovereign immunity of the United States. See Kanemoto v. Reno, 41 F.3d 641, 644 (Fed. Cir. 1994) ("Federal question jurisdiction under 28 U.S.C. § 1331 does not by itself operate as a waiver of sovereign immunity."); Pit River Home and Agr. Co-op. Ass'n v. United States, 30 F.3d 1088, 1098 n.5 (9th Cir. 1994). As to the remaining two, only 28 U.S.C. § 1346(a)(2), commonly known as the "Little" Tucker Act, is applicable, because it assigns concurrent jurisdiction to the district courts and the Court of Federal Claims for claims based "upon an

express or implied contract with the United States" that do not exceed $10,000.[79] 28 U.S.C. § 1346(a)(2); see also Roedler v. Dep't of Energy, 255 F.3d 1347, 1351 (Fed. Cir. 2001), cert. denied, 70 U.S.L.W. 3372 (U.S. Dec. 03, 2001); Lake Mohave Boat Owners Ass'n v. Nat'l Park Serv., 78 F.3d 1360, 1365 (9th Cir. 1996).

A. Plaintiffs' Only Possible Claim Is One for Breach of Contract, Based on Their Express Contracts With the United States for the Period Prior to January 1, 1946

Each of the Mexican workers recruited pursuant to the 1942 agreement and until the termination of the wartime "bracero" program on December 31, 1947, had an express contract with the United States. Until January 1, 1946, the workers' contracts with the United States contained a savings fund provision whereby the workers agreed that 10% of their wages could be withheld in a savings account to be refunded to them upon their return to Mexico. Plaintiffs' allegations that they ultimately were not refunded the 10% deductions pursuant to that contractual provision must, therefore, be characterized as breach of contract claims under the "Little" Tucker Act. Indeed, if this case proceeds to trial, these claims would be tried without a jury, 28 U.S.C. § 2402, and no punitive damages would be available against the United States, see 28 U.S.C. § 1346(a)(2); Hamlet v. United States, 873 F.2d 1414, 1416 n. 3 (Fed. Cir. 1989). Also, Federal Circuit law applies because the Federal Circuit has exclusive appellate jurisdiction over "Little" Tucker Act claims, whether or not other non-Tucker Act claims are also involved, see 28 U.S.C. § 1295(a)(2); United States v. Hohri, 482 U.S. 64, 75-76 (1987); Collehon Farming v. United States, 207 F.3d 1373,1378 (Fed. Cir. 2000); Brant v. Cleveland Nat'l Forest Serv., 843 F.2d 1222 (9th Cir. 1988).

To the extent plaintiffs seek to recover from the United States savings fund deductions allegedly withheld between 1946 and 1949 (see 2d Amended Compl. ¶¶ 1, 54), however, they have no cause of action. As noted before, government-administered savings fund deductions

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[79] A district court may permit multi-plaintiff Little Tucker Act cases to proceed "when each plaintiff waives recovery in excess of $10,000, even when potential liability exceeds $10,000." Roedler, 255 F.3d at 1351; Saraco v. United States, 61 F.3d 863, 864 (Fed. Cir. 1995), cert. denied, 517 U.S. 1166 (1996).

ceased as of January 1, 1946, and the savings fund provision was deleted from the worker's contracts for the remainder of the wartime Mexican farm labor program. See, supra, at 6. Moreover, Mexican workers recruited between 1948 and 1949 had no contractual relationship with the United States because their contracts were directly with the farmer-employers. Indeed, the two international farm labor agreements effective for part of that period made clear that the United States would not be a contracting party to the individual work contracts. See Ex. 18, 62 Stat. 3888-89 ("[t]he contracts, whether renewals or new, will be on a direct worker to [farmer-] employer basis");[80] Ex. 20, T.I.A.S. 2260 at 3 ("[t]he Individual Work Contract shall be entered into between the Employer and the Worker"); see also id. at 43-4 ("[t]he United States Government . . . will under no circumstances assume any of the Employer's obligations under the Individual Work Contract").

Thus, although the 1948 Agreement did provide for savings fund deductions, the deductions were the responsibility of the farmer-employers alone. See Ex. 18, 62 Stat. 3892, ¶ 25. As plaintiffs themselves acknowledge, the 10% wage retain was to be given directly by the farmer to the Mexican worker upon termination of the contract. See 2d Amended Compl. ¶ 47. As for the 1949 international agreement, it did not even authorize savings fund deductions. See 2d Amended Compl. ¶ 48; see also Ex. 20, T.I.A.S. 2260 at 14, 54.

Accordingly, plaintiffs' First Claim of Relief against the United States for breach of contract based on alleged withholdings between 1946 and 1949 must be dismissed.

B. Plaintiffs Have No Unjust Enrichment Or Resulting Trust Claims Against the United States Under the Tucker Act

Plaintiffs cannot rely on unjust enrichment as a theory of relief for the period January 1, 1946 through 1949, or indeed for the entire class period. See 2d Amended Compl. ¶¶ 192-95. Not only did the United States withhold no savings fund deductions between 1946 and 1949, but also the Tucker Act's waiver of sovereign immunity does not extend to claims which are based

[80] The explicit language of the 1948 Agreement thus refutes any argument that there was an implied-in-fact contract with the United States, which would require: "(1) mutuality of intent to contract; (2) consideration; and (3) lack of ambiguity in offer and acceptance." See Alliance of Descendants of Texas Land Grants v. United States, 37 F.3d 1478, 1483 (Fed. Cir. 1994).

on contracts implied in law. Hercules Inc. v. United States, 516 U.S. 417, 423 (1996); Merritt v. United States, 267 U.S. 338, 341 (1925); City of Cincinnati v. United States, 153 F.3d 1375, 1377 (Fed. Cir. 1998). In contrast with an implied-in-fact contract, which is founded upon a meeting of minds and inferred from the parties' conduct indicating mutual assent, an implied-in-law contract imposes duties that are deemed to arise by operation of law. Hercules, 516 U.S. at 424; City of Cincinnati, 153 F.3d at 1377; Teets v. Chromalloy Gas Turbine Corp., 83 F.3d 403, 407 (Fed. Cir.), cert. denied, 519 U.S. 1009 (1996).

Equitable, quasi-contract claims such as unjust enrichment have long been held to be based on contracts implied-in-law, and, thus, beyond the Tucker Act's limited waiver of sovereign immunity. See Sutton v. United States, 256 U.S. 575, 581 (1921); Aetna Cas. & Sur. Co. v. United States, 655 F.2d 1047, 1059 (Ct. Cl. 1981); A. L. Rowan & Son, General Contractors, Inc. v. HUD, 611 F.2d 997, 999 (5th Cir. 1980); Cleveland Chair Co. v. United States, 557 F.2d 244, 246 (Ct. Cl. 1977). Accordingly, plaintiffs' Twentieth Claim for Relief based on unjust enrichment must be dismissed as against the United States.

Plaintiffs' common law claim that a resulting trust was created by reason of the international agreements (see 2d Amended Compl. ¶ 82) also falls outside of the Tucker Act. As with unjust enrichment, at common law a resulting trust is created by operation of law and not based on contracts implied in fact. See Smithsonian Institution v. Meech, 169 U.S. 398, 406 (1898); Quaif v. Johnson, 4 F.3d 950, 953 (11th Cir. 1993); Wilson v. Bluefield Supply Co., 819 F.2d 457 (4th Cir. 1987) ("resulting trust arises by operation of law"); see also In re Tleel, 876 F.2d 769, 772 n.7 (9th Cir. 1989). Thus, plaintiffs' Third Claim for Relief against the United States alleging a resulting trust must also be dismissed.

In sum, plaintiffs' Tucker Act claims are cognizable, if at all, only for those workers who had executed express work contracts with the United States and only for the period September 1942 through the first pay-period of 1946.

C. The International Agreements Do Not Give Rise to Privately Enforceable Rights

But plaintiffs seek to rely on more than the individual work contracts for their breach of

contract claim. They assert that the United States' alleged violation of the international agreements with Mexico also gave rise to a breach of contract claim for the period 1942 through 1949, as the workers were the third-party beneficiaries of those agreements. 2d Amended Compl. ¶ 63-64. As discussed below, however, the international agreements at issue do not create independent, private rights to make claims against the United States.

1. The International Agreements Contain No Provision Permitting Suits Against the United States

It is well-settled that treaties and international executive agreements[81] are presumed not to create privately-enforceable rights. The Supreme Court instructed long ago that:

> A treaty[82] is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress. . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Head Money Cases, 112 U.S. 580, 598-99 (1884); see also United States v. De La Pava, 268

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[81] There are three types of international agreements other than treaties subject to the Senate advice and consent to ratification: (1) congressional-executive agreements, executed by the President upon specific authorizing legislation from Congress; (2) international agreements pursuant to treaty, executed by the President in accord with specific instructions in a prior, formal treaty; and (3) executive agreements executed pursuant to the President's own constitutional authority. United States v. Walczak, 783 F.2d 852, 855 (9th Cir. 1986); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 (1986) ["3d Restatement of Foreign Relations"]. They are binding on the United States and "may in appropriate circumstances have an effect similar to treaties in some areas of domestic law," even though they do not comply with the formalities required by Art. II, § 2, cl.2 of the Constitution. Weinberger v. Rossi, 456 U.S. 25, 30 n. 6 (1982); see also Dames & Moore v. Regan, 453 U.S. 654 (1981).

[82] The term "treaty" is generally used loosely to cover executive agreements. See 3d Restatement of Foreign Relations § 303, comment a. Indeed, "[u]nder principles of international law, the word [treaty] ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force." Weinberger, 456 U.S. at 29. Thus, unless there is "some affirmative expression of congressional intent to abrogate the United States' international obligations," id. at 32, the term "treaty" generally extends to not only Art. II treaties, but also other international agreements executed by the President. See, e.g., id. at 32-36 (statutory reference to "treaty," without limiting it to only Art. II treaties, construed to cover executive agreements).

F.3d. 157, 164 (2d Cir. 2001) ("As a general matter . . . there is a strong presumption against inferring individual rights from international treaties."); United States v. Li, 206 F.3d 56, 60 (1st Cir.) (en banc), cert. denied, 531 U.S. 956 (2000); Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992), cert. denied, 506 U.S. 955 (1992); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985); Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976).

Because "[t]reaties are contracts between or among independent nations," United States v. Zabaneh, 837 F.2d 1249 (5th Cir. 1998); see also Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 253 (1984), "individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved." Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir.), cert. denied, 498 U.S. 878 (1990); accord Zabaneh, 837 F.2d at 1261 (treaties are "designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress"); United States v. Mann, 829 F.2d 849, 852-53 (9th Cir. 1987); United States ex rel. Saroop v. Garcia, 109 F.3d 165, 167 (3d Cir. 1997). Thus, even where a treaty provides benefits for nationals of a particular state, any rights arising from it belong only to the nation-states, and individual rights are only derivative through the states. De La Pava, 268 F.3d at 164; Li, 206 F.3d at 61; Matta-Ballesteros, 896 F.2d at 259; 3d Restatement of Foreign Relations § 907, comment a ("International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts[.]").

To be sure, the presumption that treaties do not create a judicially enforceable private right of action may be overcome if the treaty manifests an intent to do so. See Mann, 829 F.2d at 852 ("A treaty may create standing if it indicates the intention to 'establish direct, affirmative, and judicially enforceable rights.'"). But such an intent must be explicit; the treaty itself must explicitly confer on private citizens rights enforceable in court.[83] See Li, 206 F.3d at 66-67

[83] It should be noted that courts sometimes conflate the question of whether a treaty is "self-executing" with whether the treaty creates private enforcement rights. See, e.g., Reagan, 859 F.2d at 938; Goldstar, 967 F.2d at 967; People of Saipan v. Dep't of Interior, 502 F.2d 90, 97

(Selya, J. and Boudin, J, concurring) (the presumption against private right of action "certainly can be overcome by explicit language that is easy to draft and to insert, just as a contract can provide expressly that rights created by it may be enforced in court by a third-party beneficiary"); Goldstar, 967 F.2d at 968; Garcia, 109 F.3d at 167 ("individuals ordinarily may not challenge treaty interpretations in the absence of an express provision within the treaty. . ."); Matta-Ballesteros, 896 F.2d at 259-60; Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 937-38 (D.C. Cir. 1988); United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981). Cf. Temengil v, Trust Territory of the Pacific Islands, 881 F.2d 647, 652-53 (9th Cir. 1989) (trusteeship agreement with former Japanese mandated islands for the benefit of the islanders did not create a private right to monetary damages against the United States because, inter alia, the treaty did not indicate an intent to create such a right), cert. denied, 496 U.S. 925 (1980).

The five relevant international agreements covering the period 1942 to 1949 – i.e., Agreements of August 4, 1942; April 26, 1943; April 29, 1943; February 20 and 21, 1948; and August 1, 1949 – give no indication that the agreements were intended to confer upon the individual Mexican workers judicially enforceable rights against the United States. Instead, they merely called upon the two governments to take certain actions, and their terms are addressed to the rights and obligations of the two governments. For example, under the 1942 agreement (as amended in 1943), which formed the basic structure of the wartime Mexican farm labor program,

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(9th Cir. 1974), cert. denied, 420 US. 1003 (1975). Although these courts use the term "self-executing" in a broad sense to refer to a treaty that *both* takes effect without implementing legislation *and* creates a private right of action, the two concepts are technically distinct. See 3d Restatement of Foreign Relations § 101 and comment h; Li, 206 F.2d at 67-68 (Selya, J. & Boudin, J., concurring). A "self-executing" treaty is one that takes effect as federal law without implementing legislation. Id.; see also Islamic Republic of Iran v. Boeing, 771 F.2d 1279, (9th Cir. 1985) (determining whether treaty was self-executing or merely executory). "Whether the terms of such a treaty provide for private rights, enforceable in domestic courts, is a wholly separate question." Li, 206 F.2d at 67-68 (Selya, J. & Boudin, J., concurring); see also 3d Restatement of Foreign Relations § 101, comment h. "The self-executing character of a treaty does not by itself establish that the treaty creates private rights." Li 206 F.2d at 67-68 (Selya, J. & Boudin, J., concurring); see, e.g., Seguros Commercial America v. Hall, 115 F. Supp. 2d 1371 (M.D. Fla 2000) (convention found to be self-executing but did not create a private right of action).

the two governments agreed that the United States would execute the individual worker's contract "under the supervision of the Mexican Government" (Ex. 1 at 56 Stat. 1966); that the Mexican health authorities would ensure that the worker met the necessary physical conditions (id.); that the United States would advise Mexico as to the number of workers needed and Mexico should determine in each case the number of workers who may leave the country without detriment to its national economy (id. at 56 Stat. 1768); that the United States would ensure that Mexican government inspectors would have free access to the Mexican workers' places of work (Ex. 2 at 57 Stat. 1161); and that either government had the right to terminate the agreement upon a 90-day notice (Ex. 1 at 56 Stat. 1769).

Although the international agreements also outlined the terms and conditions of the Mexican workers' employment, they unambiguously indicated that those rights and obligations were to be included in the individual work contracts and triggered only by the worker's execution of the contract. Indeed, the fact that the two governments believed that individual contracts between the United States and the workers were necessary belies any suggestion that the international agreements themselves created privately enforceable rights. The workers' recourse against the United States was to sue under the individual contracts or seek the diplomatic assistance of the Mexican consuls, see Ex. 1 at 56 Stat. at 1767 ("The Mexican Consuls in their respective jurisdiction shall make every effort to extend all possible protection to all these workers on any questions affecting them."); Ex. 2 at 57 Stat. 1161 ("[t]he Mexican Consuls, assisted by the Mexican Labor Inspectors *** will take all possible measures of protection in the interests of the Mexican workers in all questions affecting them"); Ex. 21 at 57 Stat. 1357; Ex. 18 at 62 Stat. 3891.

Finally, the 1942 agreement also made clear that the subject matter of the Mexican labor supply program was to be treated as a matter between states. See, e.g., Ex. 1 at 56 Stat. 1764 ("For purpose of determining the scope of this matter it was agreed, as Your Excellency is aware, to treat it as a matter between States"); see also id. at 56 Stat. 1765 ("In order to determine the scope of the conditions under which Mexican labor might proceed to the United States . . . , it

was agreed that the negotiations should be between our two Governments. . .”). These references are consistent with the principle of international law discussed above that international agreements are binding only as between the state parties. Nothing rebuts the strong presumption that the international agreements at issue are not enforceable against the United States by the individual Mexican workers.

Without any explicit language permitting suit against the United States in the international agreements at issue, sovereign immunity is a complete defense to plaintiffs’ claims against the United States under those agreements. See Canadian Transport Co. v. United States, 663 F.2d 1081, 1092 (D.C. Cir. 1980) (“In the absence of specific language in the treaty waiving the sovereign immunity of the United States, the treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom.”); 3d Restatement of Foreign Relations § 907, comment c (suits against the United States pursuant to international agreements “will not lie unless the United States has consented”); see, e.g., Goldstar, 967 F.2d at 967-68 (sovereign immunity a complete defense to plaintiffs’ damages claims against the United States under the Hague Convention); Canadian Transport Co., 663 F.2d at 1092; cf. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989) (foreign sovereign immunity complete defense to private action in United States courts where the international conventions only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs, but did not waive immunity).

Accordingly, this Court should dismiss plaintiffs’ First Claim for Relief against the United States for breach of contract to the extent plaintiffs seek to rely on the five international agreements executed between 1942 and 1949 between the United States and Mexico.

2. The International Agreements Imposed No Trust Or Fiduciary Duties On the United States

In their Second Claim for Relief, plaintiffs allege that the international agreements also imposed trust and fiduciary duties on the United States, which the United States allegedly breached. 2d Amended Compl. ¶¶ 71-72. Presumably, plaintiffs seek to rely on the Tucker Act’s waiver of sovereign immunity for their breach of trust or fiduciary duty claim. It is true that in

addition to breach of contract, a claim for money damages under the Tucker Act may also be based upon "the Constitution," "an Act of Congress," or "any regulation of an executive department" (28 U.S.C. § 1346(a)(2)) that "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." Mitchell, 463 U.S. at 216-17. However, the international agreements at issue do not fit within the Tucker Act's express terms – i.e., the three categories of substantive law upon which a claim for money damages may be based. Nor can they fairly be characterized as "money-mandating." Tippett v. United States, 185 F.3d 1250, 1255 (Fed. Cir. 1999). As already established in the preceding section, the international agreements simply do not create privately enforceable rights against the United States, whatever plaintiffs' theory of relief may be.

Even if the Court were to find otherwise, the international agreements are insufficient to establish any trust or fiduciary relationship between the United States and the Mexican workers. Federal courts have found the United States to owe a trust or fiduciary duty only in the unique context of United States' dealings with Indian tribes regarding their property. In those instances, courts rely on not only the relevant statutory scheme that mandated compensation – a prerequisite to triggering Tucker Act's waiver of sovereign immunity – but also the unique historical trust relationship between the United States and Native Americans.

For example, in United States v. Mitchell (Mitchell II), 463 U.S. 206 (1983), the leading case on Indian trust responsibilities, the Supreme Court found that the statutory and regulatory provisions in issue – which gave the federal government full responsibility to manage and operate Indian lands and resources in the best interest of the Native American owners – directly established fiduciary obligations in the United States that are enforceable in court. In so holding, the Court noted:

> Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people. This Court has previously emphasized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.

Mitchell II, 463 U.S. at 225 (citations and internal quotations omitted); see also Lincoln v. Vigil,

508 U.S. 182, 194 (1993); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 n.17 (1978) (referring to Native Americans as "wards of the nation, dependent upon its protection and good faith"); Seminole Nation v. United States, 316 U.S. 286, 297 (1942); Navajo Nation v. United States, 263 F.3d 1325, 1328 (Fed. Cir. 2001). As the Ninth Circuit has noted, "there is nothing in the relationship between the United States and any other persons . . . that is legally comparable to the unique relationship between the United States and Indian Tribes." Cato v. United States, 70 F.3d 1103, 1108 (9th Cir. 1995).

Thus, outside of the Native American context, courts have refused to find a fiduciary relationship even in circumstances where the United States assumed full control over the complainant's property. For example, in Hohri v. United States, 586 F. Supp. 769, 792 (D.D.C. 1984), aff'd for reasons stated in the district court opinion by 847 F.2d 779 (Fed. Cir.), cert. denied, 488 U.S. 925 (1988), Japanese Americans who were interned during World War II sought money damages under the Tucker Act, alleging that the internment regulatory scheme established a system of comprehensive and pervasive federal control over every aspect of their daily lives and thus gave rise to a fiduciary relationship, between the United States and the internees, which the United States allegedly breached by failing to protect their property, among other things. The court, however, refused to find a fiduciary relationship, because "[n]o act of Congress evidences an intent to create a fiduciary relationship" between the United States and the internees, and nothing in that case was "analogous to the historic relationship between the United States and the American Indians, created by treaty, judicial doctrine, and elaborate legislation." Id.; see also Hohri, 782 F.2d 227, 243 and n. 39 (D.C. Cir. 1986), vacated on other grounds by 482 U.S. 64 (1987) (observing that, except with respect to Indian tribes, there is no "broad rule in favor of finding fiduciary relationship by implication whenever the government assumes pervasive control over a group's property").

In this case, there is neither an elaborate statutory scheme evidencing a congressional intent to create a trust or fiduciary relationship between the United States and the Mexican workers, nor a historic trust relationship such as that exists between the United States and the

Indian tribes. The international agreements alone, which were negotiated at arms-length by two sovereign nations and upon which plaintiffs' breach of trust or fiduciary claim solely relies, imposed neither trust nor fiduciary obligations on the United States. They simply outlined the terms and conditions of the individual work contracts to be executed between the United States and a willing Mexican worker, including the method and timing by which the United States would pay such workers – i.e., a portion of the worker's wages would be paid after his return to Mexico. They imposed no obligations on the United States to manage or invest the withheld monies for the benefit of the workers beyond depositing them in the designated banks. Cf. United States v. Mitchell (Mitchell I), 445 U.S. 535 (1980) (no money damages claim against the United States for breach of trust where the statute created only a limited trust relationship between the United States and Indian allottees and did not impose any fiduciary management duties on the United States).

In sum, there is no trust or fiduciary duty relationship between the United States and plaintiffs, and thus, plaintiffs' Second Claim for Relief for the alleged breach must be dismissed.[84]

D. Plaintiffs' Claims Are Not Cognizable Under the Federal Tort Claims Act

The Federal Tort Claims Act ["FTCA"] gives federal courts jurisdiction over civil tort claims, accruing on and after January 1, 1945, against the United States for money damages. 28 U.S.C. §1346(b); Cato v. United States, 70 F.3d. 1103, 1107 (9th Cir. 1995). It constitutes a

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[84] It necessarily follows that plaintiffs' Nineteenth Claim for Relief for an accounting also must be dismissed as against the United States. Although the common law claim for an accounting is sometimes appropriate against the United States when the United States serves as a trustee in administering the plaintiffs' property (see, e.g., Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001); Navajo Tribe of Indians v. United States, 624 F.2d 981, 990-91 (Ct. Cl. 1980)), as discussed in this section, the United States did not act as a trustee with respect to the savings fund deductions. In any event, an accounting, like the imposition of a constructive trust, is simply a form of equitable remedy to which plaintiffs must first establish their entitlement. See American Universal Ins. v. Pugh, 821 F.2d 1352, 1356 (9th Cir. 1987); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962); In re Niles, 106 F.3d 1456, 1461 n.4 (9th Cir. 1997); Navajo Tribe of Indians, 624 F.2d at 990-91.

waiver of sovereign immunity and is "strictly construed in favor of the sovereign." FDIC v. Craft, 157 F.3d 697, 707 (9th Cir. 1998). Here, plaintiffs have alleged a common law tort, conversion, as a cause of action, claiming that defendants have wrongfully retained 10% of their wages between 1942 and 1949, and that such withholding constituted conversion. See 2d Amended Compl. ¶¶ 196-200. This claim arises from the same facts as the contractual claim and in fact, is mere surplusage to the primary claim for breach of contract.

Plaintiffs' conversion claim must be dismissed. In addition to the fact that tort claims accruing before January 1, 1945, do not fall within the FTCA, the FTCA's waiver of sovereign immunity does not extend to claims such as plaintiffs' that are essentially contractual in nature. Wood v. United States, 961 F.2d 195, 296 (Fed. Cir. 1992) (where plaintiff's claim was "essentially for breach of a contractual undertaking, and the liability, if any, depends wholly upon the government's alleged promise, the action must be under the Tucker Act, and cannot be under the Federal Tort Claims Act."); Woodbury v. United States, 313 F.2d 291 (9th Cir. 1963); Blanchard v. St. Paul Fire and Marine Ins. Co., 341 F.2d 351, 357 (5th Cir.) ("[t]hat claims based upon breach of contract are wholly alien to the Tort Claims Act is beyond question"), cert. denied, 382 U.S. 929 (1965). As the Ninth Circuit has explained:

> [I]n cases such as this, where the "tort" complained of is based entirely upon breach by the government of a promise made by it in a contract, so that the claim is in substance a breach of contract claim, and only incidentally and conceptually also a tort claim, we do not think that the common law or local state law right to "waive the breach and sue in tort" brings the case within the Federal Tort Claims Act.
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> * * *
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> Allowing the plaintiff to waive the breach and sue in tort would destroy the distinction between contract and tort preserved in the federal statutes.

Woodbury, 313 F.2d at 295-96. Thus, courts have refused to allow FTCA claims where the contract is essential to the action, and injury complained of involves the loss of profit or other purely economic harm. Martin v. United States, 649 F.2d 701, 705 (9th Cir. 1981); see, e.g., Blanchard, 341 F.2d at 351; Petersburg Borough v. United States, 839 F.2d 161 (3d Cir. 1988); Wolf v. United States, 855 F. Supp. 337 (D. Kan. 1994). Accordingly, plaintiffs have no cause

of action under the FTCA.

E. This Court Has No Jurisdiction Over Plaintiffs' Claim for Refund of Railroad Retirement Taxes

Although not specifically pled in plaintiffs' six claims of relief against the United States, plaintiffs allege elsewhere in the Second Amended Complaint that their claims concern not only the 10% savings fund deductions, but also the "reimbursement of amounts taken under the Railroad Retirement Act and the Social Security Act" from the Mexican railroad workers. 2d Amended Compl. ¶ 46. According to plaintiffs, "an unknown, but readily ascertainable number" of the Mexican railroad workers subsequently returned to the United States to either resume railroad employment or to work in employment covered by the Social Security Act, but were not credited the services they performed while under the railroad "bracero" program. Id. ¶¶ 44-45. Because these workers' contributions to the Railroad Retirement Account during the railroad program allegedly were not properly credited as pension contributions, plaintiffs seek the disgorgement of such taxes. Id.

The statutory scheme establishing the Railroad Retirement Account for the relevant period is the Railroad Retirement Act of 1937, Pub. L. No. 162, 50 Stat. 307, codified in 45 U.S.C. §§ 228a to 228z-1 (1937), now amended at 45 U.S.C. §§ 231, et seq., which was in turn financed by a schedule of taxes collected pursuant to the Internal Revenue Code of 1939, Pub. L. No. 1, 53 Stat. 1, codified in 26 U.S.C. §§ 1500-1537 (1939). All railroad employers and employees were required to pay the railroad retirement taxes, regardless of the employee's nationality. See 26 U.S.C. § 1532 (1939), 53 Stat. 181-82, see also 50 Stat. 308. Upon retirement at age 60 or older, the employee was eligible to receive an annuity calculated based on, among other factors, their earnings and length of service. See 50 Stat. 309. In 1951, pursuant to an amendment to the Act, the Social Security Administration assumed jurisdiction of benefits for employees not having at least 10 years of railroad service. Pub. L. No. 234, 65 Stat. 683 (Oct. 30, 1951). As noted before, despite the Mexican government's urging, Mexican workers recruited under the railroad program were not exempted from the railroad retirement taxes. See, supra, at 13.

Plaintiffs' claim for disgorgement must be dismissed out of hand because plaintiffs have no standing to raise the claim. The Second Amended Complaint makes no allegations that any of the named plaintiffs who allegedly worked under the railroad program – i.e., Leocadio de la Rosa, Felipe Nava, and Rafael Nava – had themselves returned to the United States to resume railroad service and were not properly credited services performed during the bracero program. See Albuquerque Indian Rights v. Lujan, 930 F.2d 49, 55 (D.C. Cir. 1991) ("burden is on the plaintiff to allege facts sufficient to support standing") (internal quotations omitted). Yet, "at a irreducible minimum, Art. III [of the Constitution] requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (internal quotations omitted). The named plaintiffs in this case are simply bystanders making abstract assertions on behalf of unnamed and unknown individuals, and thus, there is no Article III "case" or "controversy" regarding plaintiffs' disgorgement claim.

In any event, to the extent plaintiffs believe that some of the railroad workers were not properly credited with services performed during the railroad program, those workers' only remedy was to file a protest with the Railroad Retirement Board within four years of obtaining their service and earning records (see 45 U.S.C. § 231h) – a yearly certificate issued to all railroad employees who have reported earnings in the preceding year and which reflects those employees' current and cumulative railroad service and compensation. Judicial review is possible only after a claimant has exhausted all of his administrative remedies with the Board and only by the court of appeals. 45 U.S.C. §§ 231g, 355(f). In short, this Court has no jurisdiction over plaintiffs' claim for disgorgement of the railroad retirement taxes.

III. Plaintiffs' Claims Against the United States Are Time-Barred

A. Plaintiffs Failed to Bring Suit Within Six Years of Accrual

In any event, all of plaintiffs' claims are time-barred. 28 U.S.C. § 2401(a) provides that "every civil action commenced against the United States" is barred "unless the complaint is filed

within six years after the right of action first accrues." This provision "applies to all civil actions whether legal, equitable or mixed." Nesovic v. United States, 71 F.3d 776, 778 (9th Cir. 1995) (internal quotations omitted). Plaintiffs' Little Tucker Act claims are subject to the six-year limitations period.[85] Bray v. United States, 785 F.2d 989, 990 (Fed. Cir. 1986).

Importantly, because a limitation provision for suits against the United States is a condition on the waiver of sovereign immunity (Mottaz, 476 U.S. at 841; Block v. North Dakota, 461 U.S. 273, 287 (1983); Brice v. Secretary of HHS, 240 F.3d 1367, 1370 (Fed. Cir.), cert. denied, 1226 S. Ct. 614 (2001); United States v. Jerves, 966 F.2d 517, 521 (9th Cir. 1992)), the failure to sue the United States within this six-year period "is not simply a waivable defense; it deprives the district court of jurisdiction to entertain the action." Nesovic, 71 F.3d at 777-78 (internal quotations and citation omitted); accord Bath Iron Works Corp. v. United States, 20 F.3d 1567, 1572 (Fed. Cir. 1994) (six-year limitation period applicable to Tucker Act is "unequivocally jurisdictional"); Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988) ("The 6-year statute of limitations on actions against the United States is a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity . . .").

Here, plaintiffs clearly failed to bring their claims within six years of accrual. As a general matter, a cause of action accrues "when all the events have occurred that fix the defendant's alleged liability and entitle the plaintiff to institute an action[,] and the plaintiff was or should have been aware of their existence." Boling v. United States, 220 F.3d 1365, 1370 (Fed. Cir. 2000); see also Ariadne Fin. Servs. Pty. Ltd. v. United States, 133 F.3d 874, 880 (Fed. Cir.), cert. denied, 525 U.S. 823 (1998); Volk v. D. A. Davidson & Co., 816 F.2d 1406, 1416 (9th Cir. 1987). "[T]he question whether the pertinent events have occurred is determined under an *objective standard*; a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue." Fallini v. United States, 56 F.3d 1378, 1380

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[85] In addition, assuming arguendo that plaintiffs have a cognizable claim under the FTCA, it is barred by the FTCA's two-year statute of limitations. See 28 U.S.C. § 2401(b); Cato v. United States, 70 F.3d 1103, 1107 (9th Cir. 1995).

(Fed. Cir. 1995) (emphasis added), cert. denied, 517 U.S. 1243 (1996).

All pertinent events that might fix the United States' alleged liability occurred more than six years before the filing of this suit. As discussed before, the only workers who could possibly state a claim against the United States based on the savings fund deductions were those recruited prior to 1946, as government-administered savings fund deductions ceased as of January 1, 1946. See, supra, at 6. In fact, because the workers' contracts were generally only for six months, it is reasonable to assume that workers recruited during the early years of the program had returned to Mexico long before 1946. Even for those workers who had renewed their contracts, all contracts with the United States were terminated on or before December 31, 1947. See, supra, at 8.

Plaintiffs' claims accrued, if at all, within a reasonable time after the termination of their work contracts with the United States and when they allegedly could not reclaim the savings fund deductions from the respective Mexican banks in Mexico. Cf. Hohri, 586 F. Supp. at 792 (WWII Japanese internees' breach of contract and bailment claims against the United States time-barred because the government's alleged failure to live up to its promise to protect the internees' persons and property or to return the bailed goods should have been evident both during and after the war); id. ("[w]here no time for demand is specified by contract, demand must be made within a reasonable time after the bailor is entitled to the return of property"). Even assuming delays in the processing of their requests for refund, plaintiffs cannot wait half a century to assert their rights.[86] As the Supreme Court has taught:

> Statutes of limitations, which are found and approved in all systems of enlightened jurisprudence, represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a

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[86] Indeed, courts confronted with civil claims arising out of World War II-era events have routinely found them untimely. See, e.g., In re WWII Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160, 1180 (N.D. Cal. 2001); Iwanowa v. Ford Motor Col., 67 F. Supp. 2d 424, 461-63 (D.N.J. 1999); Sampson v. Federal Republic of Germany, 975 F. Supp. 1108, 1122 (N.D. Ill. 1997), aff'd by 250 F.3d 1145 (7th Cir. 2001); Handel v. Artukovic, 601 F. Supp. 1421, 1431 (C.D. Cal. 1985); Kalmich v. Bruno, 450 F. Supp. 227, 229-30 (N.D. Ill. 1978).

> reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

Kubrick, 444 U.S. at 117 (internal citations and quotations omitted).

The policy concerns behind limitations provisions for suits against the United States are particularly poignant because the government administers hundreds of programs at any given time, and, as a matter of course, disposes of its records pursuant to pre-determined retention schedules, such as the General Records Schedules issued by the National Archives and Records Administration ["NARA"], 36 C.F.R. § 1228.44, or upon the specific approval of NARA. See Decl. of Elizabeth Fugitt, ¶ 5 [Ex. 37]; 36 C.F.R. Ch. XII, Subch. B, Pt. 1228 (Disposition of Federal Records). Plaintiffs' claims relate to a long-terminated government program that was administered by multiple agencies during the Second World War with the close cooperation of a foreign government. The federal agencies most directly responsible for the "bracero" programs – i.e., the War Manpower Commission, the Farm Security Administration, and the War Food Administration – have long been abolished and their functions subsumed into other federal agencies which have also gone through various restructurings over the last fifty years.[87] Even if relevant documents have survived, they are likely to be incomplete and difficult, if not impossible, to locate. In sum, plaintiffs' claims are precisely the type of stale claim that

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[87] The War Manpower Commission, which was responsible for promulgating policies and directives for all wartime recruitment and utilization of manpower and which was responsible for the railroad program, was abolished in September 1945, and most of its functions were transferred to the Department of Labor. See Exec. Order No. 9617 (Sept. 19, 1945); see also United States Government Manual (2d ed. 1945) at 932-34.

As for the agricultural labor program, it was first administered by the Farm Security Administration and then the War Food Administration beginning in 1943. See Exec. Order No. 9334 (April 19, 1943). In June 1945, WFA was abolished, and its labor functions were transferred to the Production and Marketing Administration ["PMA"]. In 1953, PMA was re-designated Commodity Stabilization Service, which became part of Agriculture Stabilization and Conservation Service ["ASCS"] in 1961. In October 1994, ASCS was restructured and became part of the Consolidated Farm Service Agency. The latter was renamed the Farm Service Agency a year later. See Ex. 37, Fugitt Decl., ¶ 3.

Congress intended 28 U.S.C. § 2401(a) to preclude, and this Court has no jurisdiction over them.

B. No Equitable Tolling Or Estoppel Doctrine Is Applicable To Plaintiffs' Claims Against the United States

Plaintiffs allege that any statute of limitations is equitably tolled because they and the putative class members were illiterate, from a lower socioeconomic background, and lacked resources to pursue their claims; because they were required to travel to Mexico City to reclaim their 10% retain when most of them were from isolated, rural regions; and because the "bracero" program was administered pursuant to international agreements. 2d Amended Compl. ¶¶ 50, 52.

In addition, plaintiffs allege that they and the putative class members remained ignorant of the information necessary to pursue their claims because defendants had failed to inform or advise them, and/or had concealed from them, such vital information as the amounts, transmittals and disposition of the withheld monies. Id. at ¶ 51. According to plaintiffs, "defendants' wrongdoing has only recently come to light as a result of extensive recent coverage in Mexican and U.S. press." Id. at ¶ 50. Plaintiffs also attempt to invoke the continuing violation doctrine, alleging that defendants' alleged failure to return the money and repeated denials of information to the workers "constitute deliberate, continuous and ongoing violations which span the last fifty years." Id. at ¶ 52.

Notably, despite the claim of ignorance now, the original and the First Amended Complaints both acknowledged that some of the putative class members knew about the savings fund deductions and their right to a refund. Both complaints alleged that some of the workers had attempted over the years to reclaim the funds from the Mexican banks but without success. Compl. ¶¶ 37, 57; 1st Amended Compl. ¶¶ 36, 57. In the First Amended Complaint, plaintiffs also acknowledged that some workers were able to reclaim a portion of the money. See 1st Amended Compl. ¶¶ 37, 58. These workers allegedly were advised to leave an address where the remaining funds could be sent and/or to return at a later date to retrieve the balance of their funds. Id. Although plaintiffs have now deleted these statements in the Second Amended Complaint, it is reasonable to assume that plaintiffs' counsel had conducted sufficient inquiry, as required by Fed. R. Civ. P. 11, before asserting them in the prior complaints.

In any event, as explained below, no equitable tolling or estoppel principle is applicable to overcome the jurisdictional bar of 28 U.S.C. § 2401(a) in this case.

1. Facts Necessary to Pursue Plaintiffs' Claims Against the United States Were Neither "Inherently Unknowable" Nor Concealed by the United States

To toll a statute of limitations, the plaintiff must show either that "the injury was inherently unknowable at the accrual date" or that "the defendant has concealed its acts with the result that plaintiff was unaware of their existence." Catawba Indian Tribe v. United States, 982 F.2d 1564, 1571 (Fed. Cir.) (quotations and citations omitted), cert. denied, 509 U.S. 904 (1993); see also Hopland Bank of Pomo Indians, 855 F.2d at 1576 ("the statute of limitations can be tolled where the government fraudulently or deliberately conceals material facts relevant to a plaintiff's claim so that the plaintiff was unaware of their existence and could not have discovered the basis of his claim"). "[I]gnorance of rights which should be known is not enough." Id; accord Grimmett v. Brown, 75 F.3d 506, 515 (9th Cir. 1996).

As the Supreme Court has noted, federal courts have permitted equitable tolling "only sparingly," such as when "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Irwin, 498 U.S. at 96. The principles of equitable tolling "do not extend to what is at best a garden variety claim of excusable neglect," nor is the doctrine available "where the claimant failed to exercise due diligence in preserving his legal rights." Id.

Applying the above standard, it is immediately apparent that equitable tolling is inapplicable to plaintiffs' claims. First, plaintiffs simply cannot establish that their injury was "inherently unknowable" or that the United States has concealed any material facts necessary to pursuit of their claims. As plaintiffs themselves acknowledge, the 10% retain was an express term of the individual work agreement executed by each worker. See 2d Amended Compl., ¶¶ 31, 32, 34. The terms of the contract were explained to the workers at the point of recruitment in Mexico, and each worker was provided with the original copy of his contract, written in both

Spanish and English. See, supra, at 4-5. Moreover, prior to repatriation, the workers were also provided instructions about how to reclaim the 10% retain once they returned to Mexico. See, supra, at 14-15. Thus, when the worker returned to Mexico and did not receive a refund of the 10% retain, he was on notice to find out what happened to the money. It is illogical to argue that plaintiffs' alleged injury was "inherently unknowable" when plaintiffs should have known whether they themselves had received the promised refund. Plaintiffs were not in the dark, and indeed, as a matter of historical fact, many workers did inquire about their savings fund account either directly with the U.S. government agency or through the Mexican consulate, among others. See, supra, at 15-16. Even plaintiffs' original and first amended complaints alleged that some workers were aware of the savings fund deductions and had attempted over the years to reclaim the funds. See, supra, at 37.

Lest there be any doubt, the international agreements, which were reprinted in the Statutes at Large for the relevant years, also made explicit the withholding of a portion of the workers' wages, and the two governments' arrangements regarding the deposit, transfer, and return of the withheld monies. These agreements alone provided plaintiffs sufficient facts to pursue their claims against the United States fifty years ago, just as plaintiffs now rely heavily on them in asserting their claims. Cf. Japanese War Notes Claimants Ass'n v. United States, 373 F.2d 356, 358-60 (Ct. Cl.), cert. denied, 390 U.S. 975 (1967) (where plaintiff's claim for United States indemnification of its rights against Japan was based on the Treaty of Peace between the WWII allied powers and Japan, the date of the treaty started the statute of limitations because the treaty was neither concealed by defendant nor inherently unknowable).

The Federal Circuit's decision in Alliance of Descendants of Texas Land Grants v. United States, 37 F.3d 1478, 1481 (Fed. Cir. 1994), is instructive. That case involves a treaty signed by the United States and Mexico in 1941, which extinguished all claims of nationals of each country against the government of the other regarding land disputes on both sides of the border. Id. 1480. The United States compensated its own citizens for their land claims but referred Mexican claimants to Mexico for relief. Id. A class of Mexican nationals whose land

claims were extinguished by the treaty brought suit against the United States in 1990 after unsuccessfully suing their own government. Id. at 1480-81. The court found the plaintiffs' suit time-barred because their claims accrued when the treaty entered into force in 1942, not when they learned that the Mexican government would not compensate them. Id. at 1482. Because the explicit terms of the 1941 treaty extinguished the plaintiffs' land claims, plaintiffs could not argue that facts underlying their lawsuit were inherently unknowable. Id. at 1483. Notably, the court also found that the United States did not "prejudicially conceal facts" from the plaintiffs by referring them to the Mexican government, as the referrals were consistent with United States' view that those plaintiffs' land claims should be addressed by Mexico. Id. at 1482.

Due diligence required plaintiffs to bring suit within six years of learning that they did not receive the withheld savings fund, an amount that would have equaled 10% of the wages they earned while in the United States. Their protestation that defendants failed to advise them of, or concealed from them, such information as "the amount of money deducted from their wages," "the amounts transmitted to Wells Fargo and the Mexican banks," and "the disposition of funds upon return of those monies to Mexico," 2d Amended Compl. ¶ 51 a-c, does not change the tolling analysis, for knowledge of such information was not necessary to the pursuit of plaintiffs' claims. In point of fact, plaintiffs' present action seeks an accounting to determine precisely the very same information they now claim was necessary to enable them to bring suit fifty years ago. While the information may or may not help substantiate plaintiffs' claims, "[d]efendant is not required to wait until plaintiff has started substantiating his claims by the discovery of evidence. Once plaintiff is on inquiry that it has a potential claim, the statute can start to run." Welcker v. United States, 752 F.2d 1577, 1582 (Fed. Cir. 1985) (quoting Japanese War Notes Claimants Ass'n, 373 F.2d at 358-59), cert. denied, 494 U.S. 826 (1985).

Moreover, the Mexican government's publication of "Los Braceros" in 1946 should have further prompted a reasonable person exercising due diligence in preserving his legal rights to determine the whereabouts of his savings fund. Not only did "Los Braceros" detail the savings fund arrangements, it also reported the savings fund amounts transferred to the respective

Mexican banks from the United States, and the amounts reportedly distributed to the railroad and farm workers as of mid-1946. See, supra, at 13-14. If plaintiffs were still awaiting their refund as of that time, they should have known to follow up when the refund was not forthcoming. At bottom, "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984); see also Lehman v. United States, 154 F.3d 1010, 1016 (9th Cir.1998) ("Equitable tolling . . . is not available to avoid the consequences of one's own negligence."), cert. denied, 526 U.S. 1040 (1999).

What remain of plaintiffs' tolling argument are plaintiffs' alleged illiteracy, low socioeconomic background, and lack of resources to pursue their rights, and the claim that they were required to travel to Mexico City to reclaim the money when most of them lived in rural regions of Mexico. But those circumstances amount to, at best, "garden variety claims of excusable neglect" that cannot justify the extraordinary remedy of equitable tolling. Irwin, 498 U.S. at 96; see, e.g., id.; Leonard v. Gober, 223 F.3d 1374, 1375-76 (Fed. Cir. 2000), cert. denied, 531 U.S. 1130 (2001); see also Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 240 (3rd Cir. 1999) ("Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants") (quoting Baldwin County Welcome Ctr., 446 U.S. at 152). If plaintiffs could not read their contracts due to illiteracy, it was within their power to ask. See Wood v. Carpenter, 101 U.S. 135, 143 (1879) ("the means of knowledge are the same thing in effect as knowledge itself"). In any event, "[b]ecause ignorance of legal rights does not toll a statute of limitations, it is irrelevant whether that ignorance is due to illiteracy or another reason." Barrow v. New Orleans Steamship Ass'n, 932 F.2d 473, 478 (5th Cir. 1991) (internal citation and quotations omitted).

As for plaintiffs' allegation that they were required to travel from rural areas to Mexico City in order to reclaim the money, it merely suggests that plaintiffs knew their right to a refund

but did not pursue it.[88] Importantly, their inability to collect the 10% retain due to distance would not have prevented them from filing suit to determine whether the United States, in effect, had breached the work contract. To the extent plaintiffs contend that they were unaware of the opportunity to bring their claims in the United States, "[t]he limitation period does not toll simply because a party is ignorant of her cause of action." Grimmett, 75 F.3d at 515; see also Catawba Indian Tribe, 982 F.2d at 1571; Volk, 816 F.2d at 1416; see also In re WWII Era Japanese Forced Labor Litig., 164 F. Supp. 2d at 1180 (noting that Korean and Japanese plaintiffs not entitled to equitable tolling based on ignorance of their right to sue in U.S. court).

Finally, plaintiffs appear to believe that equitable tolling is available simply by virtue of the fact that the "bracero" program was administered by the United States pursuant to international agreements. 2d Amended Compl. ¶ 52. However, as the Supreme Court has said, "[b]ecause the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity, no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants." Irwin 498 U.S. at 96; accord Leonard, 223 F.3d at 1376; Hopland Band of Pomo Indians, 855 F.2d at 1579. In sum, no equitable tolling is applicable here.

2. The Statute of Limitations Was Not Tolled By Fraudulent Concealment

The above discussion makes it plain that plaintiffs also cannot invoke the doctrine of fraudulent concealment, which is applicable "if the plaintiff both pleads and proves that the defendant actively misled her, and that she had neither actual nor constructive knowledge of the facts constituting her cause of action despite her due diligence." Grimmett v. Brown, 75 F.3d 506, 514 (9th Cir. 1996). The doctrine requires the plaintiff to "plead with particularity the circumstances surrounding the fraudulent concealment and [to] state facts showing his due diligence in trying to uncover the facts." Conerly v. Westinghouse Elec. Corp., 623 F.2d 117,

[88] While refunds were initially distributed only in Mexico City, in 1943 the Mexican government amended the procedures to allow the workers living outside of Mexico City to receive the money by postal order. See, supra, at 14-15.

120 (9th Cir. 1980). Failure to plead "affirmative conduct" on the part of the defendant – which would lead a reasonable person to believe that he did not have a claim for relief – waives this tolling argument. Volk, 816 F.2d at 1415; see also Grimmett, 75 F.3d at 514.

Here, instead of pleading any affirmative misconduct on the part of the United States with any particularity, plaintiffs make only a single, conclusory allegation that "[t]he braceros' lack of awareness of [the vital information essential to pursue their claims] was caused by the failure of defendants to effectively inform or advise the braceros of such information and/or defendants' concealment of such information, or crucial portions thereof, from the braceros." 2d Amended Compl. ¶ 51. Clearly, this conclusory allegation is insufficient to invoke the fraudulent concealment doctrine. See Grimmett, 75 F.3d at 514 (plaintiff's failure to plead the allegedly concealed facts in her complaint waives the fraudulent concealment claim); cf. Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993) (failure to plead fraud with particularity required dismissal under Fed. R. Civ. P. 9(b)).

Moreover, even assuming the truth of that allegation, the law is clear that "a mere failure to come forward with facts that would provide the plaintiff with a basis for suit does not constitute fraudulent concealment." Simmons Oil v. Tesoro Petroleum Corp., 86 F.3d 1138, 1143 (Fed. Cir. 1996); accord Volk, 816 F.2d 1406, 1415 (9th Cir. 1987). Even a defendant's "failure to own up" to his illegal conduct is not enough to constitute active concealment. Grimmett, 75 F.3d at 515 (internal quotations omitted); Simmons Oil, 86 F.3d at 1143.

In any event, the preceding section already established that plaintiffs had actual notice of their potential cause of action because the savings fund arrangement was explicitly provided in the work contract and was explained to the workers at various points. Cf. Volk, 858 F.2d at 503 (investors who received an annual report and a letter detailing the limited partnership's investments could not toll the statute of limitation for fraud, because the documents made it clear that plaintiffs had paid more for their investment than it was worth). The international agreements, and the Mexican government's 1946 report, "Los Braceros," also provided plaintiffs with constructive notice. In addition, the savings fund arrangement was further discussed in

House and Senate committee reports in 1963 and 1980, respectively. See 1963 House Comm. Print at 29, 32; 1980 Senate Comm. Print at 24.

The fact that beginning in 1943, many Mexican workers had requested information concerning, or were complaining about not receiving, their 10% withholding completely belies any claim that defendants had concealed material facts constituting plaintiffs' cause of action. See, supra, at 14-15. Indeed, relying on publicly available information, many scholarly articles since WWII have been able to address the subject of the savings fund arrangement, including the amounts allegedly deducted from the workers and whether the workers received the refunds. See, e.g., DAVID RICHARD LESSARD, AGRARIANISM AND NATIONALISM: MEXICO AND THE BRACERO PROGRAM, 1942-1947, at 183-187 (1984) (Ph.D. dissertation, University Microfilms Int'l); OTEY M. SCRUGGS, BRACEROS, "WETBACKS," AND THE FARM LABOR PROGRAM: MEXICAN AGRICULTURAL LABOR IN THE UNITED STATES, 1942-54, at 177-79, 286-87 (1988) (originally presented as Ph. D. dissertation in 1957); RICHARD B. CRAIG, THE BRACERO PROGRAM, INTEREST GROUPS AND FOREIGN POLICY, 45 and n. 25 (1971); BARBARA A. DRISCOLL, THE TRACKS NORTH, THE RAILROAD BRACERO PROGRAM OF WORLD WAR II, at 103-04 (1999). Accordingly, any claim of fraudulent concealment by plaintiffs must be rejected.

3. The Continuing Violation Theory Is Inapplicable Because There Is No "Present Violation" Within the Limitations Period

Plaintiffs also attempt to invoke the continuing violation doctrine, alleging that defendants' alleged failure to refund the savings fund deductions and repeated denials of information to plaintiffs "constitute deliberate, continuous and ongoing violations which span the last fifty years." 2d Amended Compl., ¶ 52. The continuing violation doctrine has been held to save time-barred claims when it would have been unreasonable to expect the plaintiff to sue at an early stage in a continuing course of conduct, such as when particular conduct would be recognized as a violation only in light of later events. Bosley v. Merit Sys. Protection Bd., 162 F.3d 665, 667 (Fed. Cir. 1998); Taylor v. FDIC, 132 F.3d 753, 765 (D.C. Cir. 1997).

The doctrine, however, requires a "present violation" within the limitation period.

Havens Realty Corp. v. Coleman, 455 U.S. 363, 381 (1982); United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977). A plaintiff must plead "a series of distinct events – each of which gives rise to a separate cause of action – as a single continuing event," and the last event must fall within the applicable limitations period. Ariadne Fin. Servs., 133 F.3d at 878. Mere present effects of past wrongs cannot trigger a finding of a continuing violation. United Air Lines, 431 U.S. at 558; Boling, 220 F.3d at 1373 (no continuing violation "where a single governmental action causes a series of deleterious effects, even though those effects may extend long after the initial governmental breach"); Hatter v. United States, 203 F.3d 795, 797-98 (Fed. Cir. 2000) (en banc), reversed in part on other grounds by 532 U.S. 557 (2001); Jersey Heights Neighborhood Ass'n. v. Glendening, 174 F.3d 180, 189 (4th Cir. 1999) ("a continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation"). As the Supreme Court has taught, the proper focus is upon the time of the breach of duty or wrongful act, "not upon the time at which the consequences of the acts became most painful." Delaware State College v. Ricks, 449 U.S. 250, 258 (1980).

In this case, plaintiffs do not allege that they suffered a present, new injury within six years prior to this lawsuit. In fact, any breach of the government's alleged duty or of the individual work contracts would have occurred in the 1940s. Even if a worker had executed separate work contracts, each of which was breached, no breach would have occurred within the last six years. While the monetary effects of the alleged breach may have continued until today, they do not render the original breach continuing. See Bosley, 162 F.3d at 667 (denial of a pay increase to plaintiffs had monetary effects that continued into the future but "[s]uch consequences of an alleged violation [] do not constitute separate violations or render the original violation continuing."); Ariadne Fin. Servs., 133 F.3d at 878 (continuing violation doctrine inapplicable where government repudiated a 25-year contract four years into the contract, and plaintiff allegedly suffered damages for each year thereafter due to the breach).

In sum, the continuing violation doctrine does not help the plaintiffs, and this Court is without jurisdiction to review their time-barred claims.

IV. Plaintiffs' Claims Are Barred by the Doctrine of Laches

Finally, even if plaintiffs' claims are not time-barred, they are barred by the doctrine of laches. The defense is available to the United States (Nicholas v. United States, 257 U.S. 71 (1921)), and "may be applied apart from, and irrespective of, [the] jurisdictional requirement of [Tucker Act's six-year statute of limitation]." Oliveira v. United States, 827 F.2d 735-740 (Fed. Cir. 1987). The doctrine bars a plaintiff's claim when "the plaintiff delayed filing suit an unreasonable and inexcusable length of time after the plaintiff knew or reasonably should have known of its claim against the defendant; and . . . the delay resulted in material prejudice or injury to the defendant." Wanlass v. General Electric Co., 148 F.3d 1334, 1337 (Fed. Cir. 1998) (citation and quotations omitted); accord Danjaq LLC v. Sony Corp., 263 F.3d 942, 952-56 (9th Cir. 2001) (laches differs from a statute of limitations in that "the claim is barred because the plaintiffs' delay occasioned the defendant's prejudice").

Undoubtedly, there is an inexcusable and unreasonable delay in the filing of this suit. Cf. Wanlass, 148 F.3d at 1337 ("A delay of more than six years raises a presumption that it is unreasonable, inexcusable, and prejudicial."); Danjaq, 263 F.3d at 962-3 ("by any metric, this delay [of nineteen to thirty-six years] is more than enough"). For more than half a century, plaintiffs sat on rights that they knew or should have known – rights that were explicitly provided in their individual contracts with the United States, and explained to them at various points. This delay is inexcusable because "the law is well settled that where the question of laches is in issue[,] the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry." Kling v. Hallmark Cards, Inc., 225 F.3d 1030, 1038 (9th Cir. 2000) (quoting Johnston v. Standard Mining Co., 148 U.S. 360, 370 (1893)). As the Federal Circuit has noted, "[t]he Supreme Court has consistently imputed to parties who failed to examine readily available information the knowledge contained in it and the results of inquiries that the knowledge would have motivated a reasonable man to conduct." Wanlass, 148 F.3d at 1339-40.

Plaintiffs cannot now revive their long-abandoned claims without materially prejudicing

the United States' defense of this case. A defendant suffers an evidentiary or "defense" prejudice when he is unable "to present a full and fair defense on the merits due to the loss of records, the death of a witness, or the unreliability of memories of long past events, thereby undermining the court's ability to judge the facts." Wanlass, 148 F.3d at 1337 (quoting A.C. Aukerman Co. v. R. L. Chaides Constr. Co., 960 F.2d 1020, 1039 (Fed. Cir. 1992) (en banc)); accord Danjaq, 263 F.3d at 955.

The extraordinary lapse of time in this case necessarily has led to the loss of evidence essential to United States' defense. In addition to the fact that the federal agencies directly responsible for the "bracero" programs have long been abolished (see, supra, note 87), employees of both the United States and Mexican governments who had personal knowledge of the programs most certainly have either died or retired, as have employees of the railroad companies, growers or grower associations that subcontracted the workers. Cf. Danjaq, 263 F.3d at 955 (district court properly found laches because many of the key figures in the case had died in the intervening forty years and many of the relevant records were missing).

Most of the relevant documents within the United States' custody in the 1940s most likely have been destroyed pursuant to government's pre-determined record retention schedules. In particular, records of the individuals workers' contracts and payrolls or ledgers of the workers' savings fund deductions compiled by the employers and submitted to the relevant government agencies most likely no longer exist.[89] Indeed, under the current General Records Schedules issued by the Archivist of the United States to provide disposal authorization for administrative

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[89] See Ex. 37, Decl. Fugitt, ¶¶ 7-9; letter from Douglas A. Gifford, Area Records Officer, Commodity Stabilization Service [previously PMA] to GSA, Federal Records Center, Apr. 26, 1954 (reflecting that GSA containers 39351 to 38361, "ledger cards for Mexican labor," were destroyed) [attached as Ex. 38]; letter from Joseph D. Suster, Director of Records Management Program, NARA, to Railroad Retirement Board, Oct. 24, 2001 and attachments (reflecting that 18 cartons of labor records containing "contracts for Mexican Nationals," were transferred to the Chicago Federal Records Center in 1963 and destroyed in 1985) [attached as Ex. 39]; see also SF 115, Request for Authority to Dispose of Records, dated Sept. 38, 1969, Dep't of Labor, at 9-10 (reflecting disposal of farm placement records, employer and association files, "records of transactions between the employer or association using Mexican nationals and the Department of Labor") [attached as Ex. 40].

records common to agencies of the Federal Government, "many records with legal value, such as those relating to contracts, claims, property disposal, [and] payroll . . ." are designated as temporary because "the legal value of contracts and claims records diminishes rapidly after final settlement, and it ends when relevant statutes of limitations expire." The NARA Records Manual, chapter IV, at http://www.nara.gov/records/pubs/dfr/dfrchp4.html# agency VP; see also Ex. 37, Fugitt Decl. at ¶ 7.

While the National Archives and Records Administration ["NARA"] or other governmental archives and libraries have preserved select records relating to the Mexican labor program, the number is likely to be small and insufficient for the defense of this case. Indeed, "less than 3 percent of the government's records have enough enduring historical or legal significance to become part of National Archives indefinitely." NARA Records, http://www.nara.gov/nara/whatis/records.html; see also 44 U.S.C. § 2107.

At this juncture, it would be difficult to determine which workers had contracts with the United States prior to 1946 when the government-administered savings fund deductions were in effect. Although the total number of agricultural "braceros" recruited between 1942 and 1964 is reported to be more than 4.6 million, only about 174,925 of those workers were admitted before 1946. See, supra, at 11. Moreover, many of Mexican nationals who worked as "braceros" in the United States in the 1940s were not part of the government-administered program. Illegal migration of Mexican workers was a significant problem from the inception of the wartime Mexican labor program. Texas, for example, was excluded from the program by the Mexican government, and yet many Mexican nationals worked in Texas during that time period. Even when many of those illegal migrant workers were later "legalized" – 55,000 workers in 1947 alone in Texas compared to a total of only 19,632 workers recruited for the Mexican farm labor program that year – their only contractual relationship was with the farmer employers and not the United States. See, supra, at 9; President's Comm'n Report at 52.

Even more difficult is the determination of the amounts, if any, still owed to individual workers. Plaintiffs themselves acknowledged in the First Amended Complaint that some

workers received at least a portion of their savings funds. See 1st Amended Compl. ¶¶ 37, 58. Indeed, as of March 15, 1946, USDA reported that it had remitted $16,010,111.00 to the Mexican Agricultural Credit Bank on behalf of the farm workers. The Mexican government similarly reported that the Mexican Agricultural Credit bank had received, by mid-1946, $16,595,297.730 for the farm workers, with approximately 69% of that amount having been disbursed as of that time. See, supra, at 13-14. The disbursement rate was reported to be much higher for railroad workers, 95% of the $18,239,928.01 received by the Mexican National Savings Bank was disbursed as of June 1946.

Regardless of whether savings fund collections continued to be remitted to Mexico and refunded to the workers, payment now by the United States will be double recovery to at least some of the workers, the type of prejudice avoidable had the suit been brought timely. See Danjaq, 263 F.3d at 955 ("A defendant may also demonstrate prejudice by showing that it . . . suffered consequences that it would not have, had the plaintiff brought suit promptly."). Even assuming no worker were refunded the 10% savings fund, their different lengths of stay and the different wages applicable to different types of farm and track work or even locality will likely make it impossible to determine each worker's savings fund amount.

In sum, plaintiffs' claims are barred by the doctrine of laches, and should be dismissed.

CONCLUSION

For the foregoing reasons, Defendant United States of America respectfully requests that the Court dismiss this action as to the United States.

Respectfully submitted,

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